A

DR MOHD NASIR HASHIM

v.

MENTERI DALAM NEGERI MALAYSIA

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: W-01-13-2003]

C

16 AUGUST 2006

UNINCORPORATED ASSOCIATIONS: *Societies - Registration - Application by appellant and twelve others to Registrar of Societies to register themselves as a political society - Registration refused at national level but granted in State of Selangor - Policy of Registrar - National security - Judicial review - Whether fundamental right of appellant infringed - Societies Act 1966, s. 7(1) - Federal Constitution, art. 10(1)(c), (2)(c)*

D

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Application by appellant and twelve others to Registrar of Societies to register themselves as a political society - Registration refused at national level but granted in State of Selangor - Policy of Registrar - National security - Whether fundamental right of appellant infringed - Societies Act 1966, s. 7(1) - Federal Constitution, art. 10(1)(c), (2)(c)*

E

F

CONSTITUTIONAL LAW: *Fundamental liberties - Freedom of association - Application by appellant and twelve others to Registrar of Societies to register themselves as a political society - Registration refused at national level but granted in State of Selangor - Policy of Registrar - National security - Judicial review - Whether fundamental right of appellant infringed - Societies Act 1966, s. 7(1) - Federal Constitution, art. 10(1)(c), (2)(c)*

G

H

The appellant and twelve others, who had met to form the Parti Sosialis Malaysia ('PSM') and who formed a committee of seven, applied to the Registrar of Societies ('ROS') to register themselves as a political society. The ROS declined to grant registration at national level but was prepared to grant registration in the State of Selangor. Dissatisfied, the appellant appealed to the respondent, the Minister for Home Affairs ('Minister'), who subsequently dismissed the appeal. Judicial review was sought and refused, and

I

the appellant now appealed to this court. According to the evidence, the ROS was not prepared to grant registration at the national level because PSM's committee did not comprise of members from at least seven of the States of Malaysia. Most of them had addresses in Selangor. It is the ROS' policy not to grant national level registration unless there is representation from at least seven of the States of Malaysia in the committee of a political society. The Minister rejected the appeal on two grounds. First, that advanced by the ROS and, second, because the registration was not in the interest of national security based on information made available by the police to the Minister. Since the decision of the ROS had telescoped into the Minister's decision, it was the latter that had been properly made the subject of the judicial review attack. It thus fell to this court to determine whether the fundamental right of the appellant to form PSM had been infringed by the ROS and the Minister. The appellant, whose case came within s. 7(1) of the Societies Act 1966 ('Act'), submitted that the imposition of the ROS' condition of registration amounted to unlawful legislation by the ROS as it was only Parliament that may impose restrictions. However, the real question requiring consideration was whether the departmental policy formulated by the ROS for himself when considering applications to register political societies at the national level was an unreasonable administrative act.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA:

(1) The appellant's argument that the departmental policy of the ROS not to register PSM at the national level was a restriction not authorised by the Federal Constitution ('FC'), was fallacious. The legislative response of Parliament under art. 10(2)(c) of the FC was the Act itself and for present purposes it was s. 7(1) of the Act. The only issue was whether this was a reasonable legislative restriction, and there was nothing in s. 7 that amounted to an unreasonable restriction on the freedom of association conferred by art. 10(1)(c) of the FC. All it does is to regulate the registration of associations to conform to the criteria set out in art. 10(2)(c) of the FC. Accordingly, s. 7(1) of the Act is a valid law. (paras 13 & 14)

(2) The departmental policy requiring a political party's committee to comprise of representatives from at least seven States of the Federation where registration is sought at national level is not an unreasonable exercise of the statutory power conferred upon the ROS by s. 7(1) of the Act. Since Malaysia has 13 States, the ROS probably had in mind that a political party seeking registration at the national level must seek to represent 50% plus one State in the Federation. There is nothing unreasonable about this. Some policy is necessary to guide the discretion conferred by s. 7 of the Act. Otherwise, it may become an unprincipled discretion. (para 17)

(3) Nowhere in the process before the ROS was any issue of national security raised. It was raised for the first time by the Minister in his affidavit in reply to the appellant's application for judicial review. It was a ground that was never put to the appellant before the commencement of proceedings, and he and PSM had no opportunity to deal with this point at all. There could be no clearer case of procedural unfairness and, as such, the Minister's refusal to direct registration on grounds of national security could not be supported. Furthermore, in the present instance, there was not a scintilla of evidence to show that issues of national security were involved. There was only the mere *ipse dixit* of the Minister based on information given by the police to him, and nothing else. On the authorities, this was insufficient and the appellant's complaint was, therefore, justified. (paras 20, 21, 22 & 23)

(4) However, in this instance, it was crystal clear that the reason advanced on grounds of national security was not the predominant reason for the Minister's decision. It stood as a separate and distinct ground for refusing registration at the national level, and was not entangled with the other reason. It did not therefore materially affect the decision based on the grounds of departmental policy. Accordingly, this was a case in which the Minster's decision to deny PSM registration at the national level may and should be upheld. (para 29)

(5) What was refused by the Minister and the ROS was registration at the national level. The ROS granted PSM registration in the State of Selangor and as advised by counsel on both sides, this did not prevent PSM from contesting in national elections. Neither was PSM prevented from seeking registration at national level if it was able to meet the ROS'

requirement. So, even if the ROS and the Minister were wrong in refusing PSM national level registration (which they were not), no injustice had been occasioned. This underpins the nature of judicial review. It is not enough that a decision of a public decision-maker is not in accordance with law. The error must be one that has caused an applicant for judicial review some harm of injustice in a broad and general sense. (para 30)

Bahasa Malaysia *translation of headnotes*

Perayu dan dua belas yang lain, yang bertemu untuk menubuhkan Parti Sosialis Malaysia ('PSM') dan seterusnya menubuhkan satu jawatankuasa tujuh orang untuk tujuan itu, telah memohon kepada Pendaftar Pertubuhan ('ROS') untuk mendaftarkan diri mereka sebagai sebuah pertubuhan politik. ROS enggan membenarkan pendaftaran di peringkat nasional tetapi bersetuju mendaftarkan pertubuhan tersebut di Negeri Selangor. Tidak berpuashati, perayu merayu kepada responden, Menteri Halehwal Dalam Negeri ('Menteri'), yang menolak rayuan. Semakan kehakiman telah dipohon dan ditolak, dan perayu merayu ke mahkamah ini. Keterangan menunjukkan bahawa ROS tidak membenarkan pendaftaran di peringkat nasional disebabkan jawatankuasa PSM tidak mengandungi ahli-ahli yang datang dari sekurang-kurangnya tujuh Negeri di Malaysia. Kebanyakan mereka mempunyai alamat di Selangor. Adalah menjadi dasar ROS untuk tidak membenarkan pendaftaran di peringkat nasional kecuali jawatankuasa parti politik itu menunjukkan representasi dari sekurang-kurang tujuh Negeri di Malaysia. Menteri menolak rayuan atas dua alasan. Pertama, apa yang diutarakan oleh ROS dan, kedua, kerana pendaftaran, berdasarkan maklumat yang diberikan oleh polis kepada Menteri, adalah tidak selaras dengan keselamatan nasional. Oleh kerana keputusan ROS telah diserap ke dalam keputusan Menteri, keputusan yang terkemudian tersebut menjadi sasaran utama semakan kehakiman. Maka itu, menjadi tanggungjawab mahkamah ini untuk menentukan sama ada hak asasi perayu untuk menubuhkan PSM telah dilanggar oleh ROS dan Menteri. Perayu, yang mana kesnya tertakluk kepada s. 7(1) Akta Pertubuhan 1966 ('Akta'), berhujah bahawa pengenaan syarat pendaftaran oleh ROS adalah pembuatan undang-undang tak sah oleh ROS kerana hanya Parlimen boleh berbuat demikian. Apapun, soalan utama yang menuntut pertimbangan adalah sama ada polisi jabatan yang digunapakai ROS sewaktu menimbang permohonan-permohonan untuk mendaftar pertubuhan politik di peringkat nasional merupakan satu tindakan pentadbiran yang tidak munasabah.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR:

(1) Hujah perayu bahawa polisi jabatan ROS yang tidak mendaftar PSM di peringkat nasional adalah satu halangan yang tidak dibenarkan oleh Perlembagaan Persekutuan ('FC'), adalah salah dan mengelirukan. Tindak balas perundangan oleh Parlimen di bawah fasal 10(2)(c) FC adalah Akta itu sendiri dan bagi maksud kes semasa ia adalah s. 7(1) Akta. Isu tunggal yang berbangkit adalah sama ada ini merupakan halangan perundangan yang munasabah. Dalam hubungan ini, tiada apapun di dalam s. 7 yang berupa halangan tak munasabah terhadap kebebasan berpersatuan yang diberi oleh fasal 10(1)(c) FC. Apa yang dibuat hanyalah untuk mengawalselia pendaftaran pertubuhan bagi menyelaraskannya dengan kriteria yang dibentang di dalam fasal 10(2)(c) FC. Dengan itu, s. 7(1) Akta adalah sah di sisi undang-undang.

(2) Polisi jabatan yang memerlukan jawatankuasa parti politik mengandungi wakil dari tujuh buah Negeri di Malaysia di mana pendaftaran yang diminta adalah bagi peringkat nasional bukanlah satu pelaksanaan tidak munasabah kuasa statutori yang diberi oleh s. 7(1) Akta kepada ROS. Oleh kerana Malaysia mengandungi 13 Negeri, ROS mungkin merasakan bahawa sesebuah parti politik yang hendak didaftarkan di peringkat nasional perlu mewakili 50% Negeri di Malaysia di tambah satu Negeri lagi. Tiada apa pun yang tidak munasabah dalam hal ini. Suatu bentuk polisi adalah perlu sebagai panduan kepada budibicara yang diberi oleh s. 7 Akta. Kalau tidak ia akan menajdi budibicara yang tak berprinsip.

(3) Dalam perjalanan proses di hadapan ROS, persoalan keselamatan awam tidak pernah pun dibangkitkan. Ia dibangkitkan buat pertama kalinya oleh Menteri di dalam afidavit jawapannya terhadap permohonan semakan kehakiman perayu. Maka ia adalah alasan yang tidak pernah dibentangkan kepada perayu sebelum prosiding bermula, dan beliau serta PSM langsung tidak berpeluang untuk menangani masaalah tersebut. Ini jelas satu ketidakadilan prosedur, dan kerana itu, keengganan Menteri untuk mengarahkan pendaftaran atas alasan keselamatan awam tidak boleh diterima. Lagipun, dalam

kes semasa, tidak ada sebarang keterangan yang menunjukkan bahawa ia melibatkan isu-isu keselamatan awam. Itu hanyalah *ipse dixit* Menteri berdasarkan maklumat yang diberikan polis kepada beliau, dan semata-mata berdasarkan itu. Menurut autoriti, itu tidak mencukupi dan bantahan perayu, dengan itu, adalah berjustifikasi.

(4) Bagimanapun, dalam kes semasa, alasan keselamatan awam jelas bukanlah alasan yang utama bagi keputusan Menteri. Ia adalah alasan yang asing dan tersendiri bagi menolak pendaftaran di peringkat nasional, dan tidak terikat dengan alasan lain. Oleh itu, ia tidak memberi kesan secara material kepada keputusan yang dilandaskan kepada polisi jabatan. Oleh yang demikian, ini adalah kes di mana keputusan Menteri untuk menolak pendaftaran di peringkat nasional boleh dan sepatutnya dikekalkan.

(5) Apa yang ditolak oleh Menteri dan ROS adalah pendaftaran di peringkat nasional. ROS membenarkan pendaftaran PSM di Negeri Selangor dan seperti yang dinasihatkan oleh peguam kedua belah pihak, ini tidak menghalang PSM dari bertanding dalam pilihanraya nasional. PSM juga tidak dihalang dari memohon pendaftaran di peringkat nasional jika dapat memenuhi syarat-syarat ROS. Oleh itu, jikapun ROS dan Menteri khilaf dalam menolak pendaftaran PSM di peringkat nasional (yang mana mereka tidak khilaf), tiada ketidakadilan telah berlaku. Inilah tunjang sebenar semakan kehakiman. Adalah tidak mencukupi bahawa sesuatu keputusan yang dibuat oleh pembuat keputusan itu hanya tidak selaras dengan undang-undang. Kecacatan hendaklah sesuatu yang menyebabkan pemohon semakan kehakiman itu ditimpa suatu musibat ketidakadilan dalam ertikatanya yang umum dan luas.

Case(s) referred to:

Banwari Nathoo v. State of Uttar Pradesh AIR [1975] All 199 ***(refd)***

British Oxygen Co Ltd v. Minister of Technology [1971] AC 610 ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(foll)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan [1997] 1 CLJ 665 CA ***(foll)***

JP Berthelsen v. Director-General of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 SC ***(foll)***

Malaysian Bar & Anor v. Government of Malaysia [1987] 2 MLJ 165 ***(refd)***
Menara Panglobal Sdn Bhd v. Ariokianathan [2006] 2 CLJ 501 CA ***(refd)***
Ngu Toh Tung v. Superintendent of Lands and Survey, Kuching Division [2006] 1 CLJ 30 CA ***(foll)***
Nordin Salleh v. Dewan Undangan Negeri Kelantan [1992] 1 CLJ 463; [1992] 3 CLJ (Rep) 135 HC ***(refd)***
Om Kumar v. Union of India AIR [2000] SC 3689 ***(refd)***
Ooi Ah Phua v. Officer in Charge Criminal Investigation Kedah/Perlis [1975] 2 MLJ 198 ***(refd)***
Palm Oil & Research & Development Board Malaysia v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***
Prince Pinder v. The Queen [2002] UKPC 46 ***(foll)***
Reg. v Broadcasting Complaints Commission, ex p Owen [1985] 1 QB 1153 ***(foll)***
Sagnata Investments Ltd v. Norwich Corporation [1971] 2 QB 614 ***(refd)***
Savrimuthu v. PP [1987] 1 CLJ 368; [1987] CLJ (Rep) 322 SC ***(refd)***
Siva Segara v. PP [1984] 2 CLJ 95; [1984] 1 CLJ (Rep) 353 FC ***(foll)***
State of Maharashtra v. Babulal Kriparam Takkamore AIR [1967] SC 1353 ***(refd)***
Suisse Security Bank & Trust Limited v. Julian Francis (in the capacity of Governor of the Central Bank of the Bahamas) [2006] UKPC 11 ***(foll)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***
Zora Singh v. JM Tandon AIR [1971] SC 1537 ***(refd)***

Legislation referred to:
Federal Constitution, arts. 5(3), 8(1), 10(1), (2)(c)
Societies Act 1966, s. 7(1)

For the appellant - Tommy Thomas (Ragunath Kesavan & CK Teng with him); M/s Teng Chang Khim & Co
For the respondent - Mary Lim (Mat Zaraai Alias & Azizah Hj Nawawi with her)
Amer Hamzah Arshad watching brief for Bar Council
Vengetraman Manickam watching brief for Hakam

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R-25-113-99]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] On 15 February 1998 the appellant and twelve others met to form the Parti Sosialis Malaysia ("PSM"). They formed a committee of seven. An application was then made to the

Registrar of Societies (ROS) to register themselves as a political society. The ROS declined to grant registration at national level. But he was prepared to grant registration in the State of Selangor. Dissatisfied with the result the appellant appealed to the respondent, the Minister for Home Affairs. The appeal was dismissed. I will deal with the ROS' reasons and those of the Minister in a moment. Judicial review was sought and refused. The appellant now appeals to us.

[2] When the appeal came on for hearing, we called on learned senior federal counsel to argue why the appeal should not be allowed and the appropriate relief be granted. This is in accordance with the usual practice in judicial review cases whenever the cause papers reveal a *prima facie* infringement of a right, in particular, a constitutionally guaranteed right: in this case the freedom of association. It is then for the State (in this case the Minister) to justify what was done or omitted to be done. It is only after such justification is established does the burden shift to the ordinary citizen to establish his or her case. Were it otherwise, the balance of justice would forever be weighted against the citizen and in favour of the Executive. That simply cannot be right as a matter of pure fairness of court procedure.

[3] I now come to the reasons given by the ROS. According to the evidence made available, the ROS was not prepared to grant registration at the national level because PSM's committee did not comprise of members from at least 7 of the States of Malaysia. Most of them had addresses in Selangor. It is the ROS' policy not to grant national level registration unless there is representation from at least 7 of the States of Malaysia in the committee of a political society. The Minister rejected the appeal on two grounds. First, that advanced by the ROS. Second, because the registration was not in the interest of national security based on information made available by the police to the Minister. Since the decision of the ROS had telescoped into the Minister's decision, it is the latter that has been properly made the subject of judicial review attack.

[4] As I understand the appellant's case it is simple enough. It is that his fundamental right to form the PSM had been infringed by the ROS and the Minister. But this simple argument was put forward in such a convoluted form by the appellant's counsel that I must confess my difficulty initially in understanding what it was that learned counsel was really getting at. So, to appreciate the

appellant's case it is necessary to consider the relevant constitutional provisions. Article 10(1)(c) guarantees to all citizens the right to form associations. Article 10(2)(c) empowers Parliament by law to impose such restrictions on the right conferred by art. 10(1)(c) "as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality".

[5] It is to be noted that art. 10(2)(c) uses the formula "such restrictions as it deems necessary or expedient". Does this mean that Parliament is free to impose any restriction however unreasonable that restriction may be? In *Nordin bin Salleh v. Dewan Undangan Negeri Kelantan* [1992] 1 CLJ 463; [1992] 3 CLJ (Rep) 135, Eusoff Chin J (as he then was) thought that: "Reasonableness is not material in art. 10(2)(c) of the Federal Constitution." But that is a view not commented on at all by any of their lordships of the Supreme Court when the case went to them. (See, [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72). In my judgment, the view expressed by Eusoff Chin J at first instance in *Nordin bin Salleh* is the product of a literal reading of art. 10(1)(c). But it must be said in fairness to that learned judge that the relevant authorities on constitutional interpretation may not have been referred to him during argument. The proper approach to the interpretation of our Federal Constitution is now too well settled to be the subject of argument or doubt. It is to be found in the joint dissent of Lord Nicholls of Birkenhead and Lord Hope of Craighead in the Privy Council case of *Prince Pinder v. The Queen* [2002] UKPC 46:

> It should never be forgotten that courts are the guardians of constitutional rights. A vitally important function of courts is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford. Provisos derogating from the scope of guaranteed rights are to be read restrictively. In the ordinary course they are to be given 'strict and narrow, rather than broad, constructions': see *The State v. Petrus* [1985] LRC (Const) 699, 720d-f, per Aguda JA in the Court of Appeal of Botswana, applied by their Lordships' Board in *R v. Hughes* [2002] 2 AC 259, 277, para 35.

[6] More than 20 years earlier, in *Dato' Menteri Othman bin Baginda & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98, Raja Azlan Shah Ag LP (as His Royal Highness then was) expressed the same view:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21. A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.' The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla v. Reynolds* [1979] 3 All ER 129, 136.
>
> It is in the light of this kind of ambulatory approach that we must construe our Constitution.

[7] The long and short of it is that our Constitution – especially those articles in it that confer on our citizens the most cherished of human rights – must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become.

[8] The other aspect to interpreting our Constitution is this. When interpreting the other parts of the Constitution, the court must bear in mind the all pervading provision of art. 8(1). That article guarantees fairness of all forms of State action. See, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771. It must also bear in mind the principle of substantive proportionality that art. 8(1) imports. See, *Om Kumar v. Union of India* AIR [2000] SC 3689. This doctrine was most recently applied by this Court in the judgment of my learned brother *Mohd Ghazali in Menara Panglobal Sdn Bhd v. Ariokianathan* [2006] 2 CLJ 501. In other words, not only must the legislative or executive response to a state of affairs be objectively fair, it must also be

proportionate to the object sought to be achieved. This is sometimes referred to as "the doctrine of rational nexus". See, *Malaysian Bar & Anor v. Government of Malaysia* [1987] 2 MLJ 165. A court is therefore entitled to strike down State action on the ground that it is disproportionate to the object sought to be achieved.

[9] Against the background of these principles it is my judgment that the restrictions which art. 10(2) empower Parliament to impose must be reasonable restrictions. In other words, the word "reasonable" must be read into the sub-clauses of art. 10(1). That words may be read into our Constitution has been established by the decision of the Federal Court in *Ooi Ah Phua v. Officer in Charge Criminal Investigation Kedah/Perlis* [1975] 2 MLJ 198. In that case, an implied restriction in the interests of justice was read into art. 5(3) of the Constitution which provides that:

> Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

Suffian LP said:

> With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The interest of justice is as important as the interest of arrested persons and it is well-known that criminal elements are deterred most of all by the certainty of detection, arrest and punishment.

So, although the Constitution did not have any words postponing the right to counsel, the Federal Court read those words into the article. So too here. We can read the word "reasonable" before the word "restrictions" in art. 10(2)(c).

[10] The view I take is reinforced by *Siva Segara v. Public Prosecutor* [1984] 2 CLJ 95; [1984] 1 CLJ (Rep) 353 where Abdul Hamid CJ (Malaya) when delivering the judgment of the Federal Court said:

Before proceeding to construe the section, the learned Judge observed that: 'the interpretation must be such that it must meet the legislative purpose of the enactment (See *Duport Steels Ltd v. Sirs* [1980] 1 All ER 529).' And that in the interpretation of a statute its language must be read in what seems to be its natural sense – *Vacher & Sons Ltd v. London Society of Compositors* [1913] AC 107. The learned Judge also observed that:

> The court as guardian of the rights and liberties enshrined in the Constitution is always jealous of any attempt to tamper with rights and liberties … the right in issue here ie, the right to assemble peaceably without arms is not absolute for the Constitution allows Parliament to impose by law such restrictions as it deems necessary in the interests of security and public order … what the court must ensure is only that any such restrictions may not amount to a total prohibition of the basic right so as to nullify or render meaningless the right guaranteed by the Constitution.

We respectfully agree with the views expressed by the learned Judge.

[11] There it is. The court must not permit restrictions upon the rights conferred by art. 10 that render those rights illusory. In other words, Parliament may only impose such restrictions as are reasonably necessary. To emphasise, only proportionate legislative response is permissible under art. 10(2)(c).

[12] That brings us to the present case. What is the restriction that Parliament has imposed here? It is s. 7 of the Societies Act 1966 ("the Act") which provides as follows.

> (1) Upon receipt of an application under section 6, the Registrar shall, subject to the provisions of this section and to such conditions as the Registrar may deem fit to impose, register the local society making the application.
>
> (2) The Registrar may refuse to register a local society if:
>
> (a) he is satisfied that such a society is a branch of any society whose registration has been cancelled under paragraph 13(1)(c); or
>
> (b) he is not satisfied that such local society has complied with the provisions of this Act and of the regulations made thereunder; or

A

(c) a dispute exists among the members of such local society as to the persons who are to be office-bearers or to hold or to administer any property of the society until the dispute is decided by a Court or by arbitration or by agreement between the members or otherwise.

B

(3) The Registrar shall refuse to register a local society where:

(a) it appears to him that such local society is unlawful under the provisions of this Act or any other written law or is likely to be used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia;

C

(b) the society has been declared by the Minister to be unlawful under section 5;

D

(c) the Registrar is satisfied that the society does not exist;

(d) the name under which the society is to be registered:

(i) appears to the Registrar to mislead or be calculated to mislead members of the public as to the true character or purpose of the society or so nearly resembles the name of such other society as is likely to deceive the members of the public or members of either society;

E

(ii) is identical to that of any other existing local society; or

F

(iii) is, in the opinion of the Registrar, undesirable;

(e) the constitution or rules of the society do not contain provisions for all matters set out in Schedule I to this Act or if the society is a mutual benefit society, matters set out in Schedule II or any other matters which the Registrar may reasonably require.

G

(4) Where the Registrar has refused to register a local society under this section, the provisions of section 17 shall apply to that local society.

H

(5) Any society that contravenes any condition imposed on it by the Registrar under subsection (1) shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding two thousand ringgit.

I

[13] You will note that the section is divided into three parts. The first mandates the ROS to register a society subject to such conditions as he may impose. The second confers a discretion to register a society in certain circumstances. The third mandates him not to register a society which falls within one of the categories set out in subsection 3. The appellant's case comes within s. 7(1). Here the ROS imposed the condition – as a matter of departmental policy – that he was prepared to register PSM at the national level only if the committee had at least one member from each of the 7 States of the Federation. Mr. Thomas has submitted that the imposition of this condition amounts to unlawful legislation by the ROS as it is only Parliament that may impose restrictions. His argument is that the departmental policy of the ROS not to register PSM at the national level is a restriction not authorised by the Constitution. With respect, I think that this argument is fallacious.

[14] As I have already said, the legislative response of Parliament under art. 10(2)(c) is the Act itself and for present purposes it is s. 7(1). The only issue is whether this is a reasonable legislative restriction. In my judgment, there is nothing in s. 7 that amounts to an unreasonable restriction on the freedom of association conferred by art. 10(1)(c). All it does is to regulate the registration of associations to conform with the criteria set out in art. 10(2)(c). Accordingly I would hold that s. 7(1) is a valid law.

[15] The real question that appears to have been missed by learned counsel for the appellant is this. Is the departmental policy formulated by the ROS for himself when considering applications to register political societies at the national level an unreasonable administrative act? In my judgment this is the true question because the first limb of art. 8(1) of the Constitution demands fairness of any form of State action. Thus, in *Palm Oil & Research & Development Board Malaysia v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265 it was held by the Federal Court as follows:

> Article 8(1) has two limbs. The first limb guarantees equality before the law. In other words, it requires fairness in all forms of State action. As Thommen J said of the equipollent art 14 of the Indian Constitution in *Shri Sitaram Sugar Co Ltd v. Union of India & Ors* [1990] 3 SCC 223 at p 251:

A Any arbitrary action, whether in the nature of a legislative or administrative or quasi-judicial exercise of power, is liable to attract the prohibition of art 14 of the Constitution. As stated in *EP Royappa v. State of Tamil Nadu* [1974] 4 SCC 3: "equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch". Unguided and unrestricted power is affected by the vice of discrimination: *Maneka Gandhi v. Union of India*. The principle of equality enshrined in art 14 must guide every State action, whether it be legislative, executive, or quasi-judicial: *Ramana Dayaram Shetty v. International Airport Authority of India* [1979] 3 SCC 489 at 511-512, *Ajay Hasia v. Khalid Mujib Sehravardi* [1981] 1 SCC 722 and *DS Nakara v. Union of India* [1983] 1 SCC 305.

[16] In *Savrimuthu v. Public Prosecutor* [1987] 1 CLJ 368; [1987] CLJ (Rep) 322, Salleh Abas LP said:

> any statutory power must be exercised reasonably and with due consideration.

It is axiomatic that a statutory power or discretion is exercised unfairly if it is exercised unreasonably and without due consideration.

[17] To answer the question posed a moment ago, it is my judgment that the departmental policy requiring a political party's committee to comprise of representatives from at least 7 States of the Federation where registration is sought at the national level is not an unreasonable exercise of the statutory power conferred upon the ROS by s. 7(1) of the Act. Since Malaysia has 13 States the ROS probably had in mind that a political party seeking registration at the national level must seek to represent 50% plus one State in the Federation. There is nothing unreasonable about this. Some policy is necessary to guide the discretion conferred by s. 7. Otherwise it may become an unprincipled discretion. As Lord Reid observed in *British Oxygen Co Ltd v. Minister of Technology* [1971] AC 610:

> There are two general grounds on which the exercise of an unqualified discretion can be attacked. It must not be exercised in bad faith, and it must not be so unreasonably exercised as to show that there cannot have been any real or genuine exercise of the discretion. But apart from that if the Minister thinks that policy or good administration requires the operation of some limiting rule, I find nothing to stop him.

It was argued on the authority of *R v. Port of London Authority, ex parte Kynoch Ltd* [1919] 1 KB 176 that the Minister is not entitled to make a rule for himself how he will in future exercise his discretion. In that case *Kynoch* owned land adjoining the Thames and wished to construct a deep-water wharf. For this they had to get the permission of the authority. Permission was refused on the ground that Parliament had charged the authority with the duty of providing such facilities. It appeared that before reaching their decision the authority had fully considered the case on its merits and in relation to the public interest. So their decision was upheld. Bankes LJ said [1919] 1 KB at 184:

> There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.

I see nothing wrong with that. But the circumstances in which discretions are exercised vary enormously and that passage cannot be applied literally in every case. The general rule is that anyone who has to exercise a statutory discretion must not 'shut [his] ears to the application' (to quote from Bankes LJ). I do not think that there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that provided the authority is always willing to listen to anyone with something new to say – of course I do not mean to say that there need be an oral hearing. In the present case the Minister's officers have carefully considered all that the appellants have had to say and I have no doubt that they will continue to do so.

[18] In *Sagnata Investments Ltd v. Norwich Corporation* [1971] 2 QB 614, Sagnata wanted to build an amusement arcade in Norwich. They applied for a permit to provide amusements with prizes. The relevant statute provided that the grant of the permit was "at the discretion of the local authority". The corporation had adopted a general policy to refuse permits for amusement arcades in Norwich. Acting in accordance with that policy it refused Sagnata a permit. The recorder at Quarter Sessions upheld that decision. An appeal to the Divisional Court was dismissed as was the subsequent appeal to the Court of Appeal. Lord Denning MR in his dissent made the following observation which was concurred in by the other two members of the court (Edmund Davies and Phillimore LJJ):

> I take it to be perfectly clear now that an administrative body, including a licensing body, which may have to consider numerous applications of a similar kind, is entitled to lay down a general policy which it proposes to follow in coming to its individual decisions, provided always that it is a reasonable policy which it is fair and just to apply. Once laid down, the administrative body is entitled to apply the policy in the individual cases which come before it. The only qualification is that the administrative body must not apply the policy so rigidly as to reject an applicant without hearing what he has to say. It must not 'shut its ears to an application' The applicant is entitled to put forward reasons urging that the policy should be changed, or saying that in any case it should not be applied to him. But, so long as the administrative body is ready to hear him and consider what he has to say, it is entitled to apply its general policy to him as to others.

[19] Here the ROS formulated a policy which, as I have already said, is not unreasonable in an objective sense. It may well have been different if the ROS and the Minister had required a person from every State in the Federation to be in PSM's committee. But that is not what happened. Like British Oxygen and Sagnata, here too, the ROS and the Minister provided the appellant an opportunity to make representations as to why the policy should not be applied to PSM. The evidence shows that the appellant and other pro-tem committee members met with officials of the ROS and that written representations were also made. So this is not the kind of case which Lord Reid had in mind in British Oxygen or which the Master of the Rolls had in Sagnata. There was no shutting of the ears in this case. The ROS acted fairly and reasonably at all times.

[20] The appellant's second ground of attack is directed at the Minister's refusal to direct registration of PSM on grounds of national security. Nowhere in the process before the ROS was any issue of national security raised. It was raised for the first time by the Minister in his affidavit in reply to the appellant's application for judicial review. It was a ground that was never put to the appellant before the commencement of proceedings. He and PSM had no opportunity to deal with this point at all. In my judgment, there can be no clearer case of procedural unfairness and as such the Minister's refusal to direct registration on grounds of national security cannot be supported.

[21] There is also an evidential point. Nowhere in his affidavit does the Minister set out any material to support the claim of national security. In *JP Berthelsen v. Director-General of Immigration, Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 when delivering the judgment of the Supreme Court, Abdoolcader SCJ said:

> We would add that in any event adequate evidence from responsible and authoritative sources would be necessary on the security aspect and no reliance can be placed in that regard on a mere ipse dixit of the first respondent to that effect in the notice of cancellation of the employment pass which the learned Judge purported to accept without more ado.

[22] The importance of Berthelsen lies in the fact that the mere incantation of the words "national security" in an affidavit should not send judges scurrying for cover or to pay immediate and unconditional obeisance to them. There must be some material disclosed to the court from which an inference of prejudice to national security may be inferred. In *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan* [1997] 1 CLJ 665 when delivering the judgment of this Court on behalf of myself and Ahmad Fairuz JCA (now Chief Justice) I said:

> Again, national security, public safety or public interest are considerations that may exclude procedural fairness in a particular case. The burden of showing that reasons for a decision ought not to be given lies, of course, upon the public decision-taker. And his mere ipse dixit upon the question is inconclusive. There must be some basis or material for suggesting that questions of public safety, public interest or national security or one or more of these are involved. In some cases, it may be quite plain and obvious from the very subject matter that they are. In others, it may not be so. Ultimately, it is for the courts to determine whether, upon the facts and circumstances of a particular case, the plea ought to be upheld.

[23] In the present instance there is not a scintilla of evidence to show that issues of national security were involved. All we have is the mere *ipse dixit* of the Minister based on information given by the police to him. Nothing else. On the authorities this is insufficient. The appellant's complaint is therefore justified. But that is not the end of the matter.

[24] Here we have a case where the Minister relied on two grounds to deny registration of PSM at the national level. One, as I have already said, is a good reason. The other is a bad reason. In my judgment where a public decision-maker gives two reasons – a good one and a bad one – for his decision the court is entitled to uphold the ultimate decision provided that the bad reason was not the overriding consideration on which the decision is based. The authorities on the point are legion.

[25] In *State of Maharashtra v. Babulal Kriparam Takkamore* AIR [1967] SC 1353, Bachawat J when delivering the judgment of the Indian Supreme Court said:

> The principle underlying these decisions appears to be this. An administrative or quasi-judicial order based on, several grounds, all taken together, cannot be sustained if it be found that some of the grounds are non-existent or irrelevant, and there is nothing to show that the authority would have passed the order on the basis of the other relevant and existing grounds. On the other hand, an order based on several grounds some of which are found to be non-existent or irrelevant, can be sustained if the Court is satisfied that the authority would have passed the order on the basis of the other relevant and existing grounds, and the exclusion of the irrelevant or non-existent grounds could not have affected the ultimate opinion or decision.

[26] In *Zora Singh v. J. M. Tandon* AIR [1971] SC 1537, Shelat J said:

> The High Court was right in holding that even if there were, amongst the reasons given by the Commissioner, some which were extraneous, if the rest were relevant and could be considered sufficient, the Commissioner's conclusions would not be vitiated. The principle that if some of the reasons relied on by a Tribunal for its conclusion turn out to be extraneous or otherwise unsustainable, its decision would be vitiated, applies to cases in which the conclusion is arrived at not on assessment of objective facts or evidence, but on subjective satisfaction. The reason is that whereas in cases where the decision is based on subjective satisfaction if some of the reasons turn out to be irrelevant or

> invalid, it would be impossible for a superior Court to find out which of the reasons, relevant or irrelevant, valid or invalid, had brought about such satisfaction. But in a case where the conclusion is based on objective facts and evidence, such a difficulty would not arise. If it is found that there was legal evidence before the Tribunal, even if some of it was irrelevant, a superior Court would not interfere if the finding can be sustained on the rest of the evidence. The reason is that in a writ petition for *certiorari* the superior Court does not sit in appeal, but exercises only supervisory jurisdiction, and therefore, does not enter into the question of sufficiency of evidence.

[27] Very recently, in *Suisse Security Bank & Trust Limited v. Julian Francis (in the capacity of Governor of the Central Bank of the Bahamas)* [2006] UKPC 11 (judgment delivered on 13 March 2006), Lord Mance delivering the advice of the board approved the following passage in the judgment of May LJ in *Reg. v Broadcasting Complaints Commission, Ex p. Owen* [1985] 1 QB 1153, at p.1177A-B,:

> Where the reasons given by a statutory body for taking or not taking a particular course of action are not mixed and can clearly be disentangled, but where the court is quite satisfied that even though one reason may be bad in law, nevertheless the statutory body would have reached precisely the same decision on the other valid reasons, then this court will not interfere by way of judicial review. In such a case, looked at realistically and with justice, such a decision of such a body ought not to be disturbed.

[28] Lord Mance then went on to say as follows:

> Their Lordships consider that the present situation is a *fortiori*. First, the Governor had already to be of the relevant opinion on the basis of the two notified considerations as at 5th March 2001, in order to issue the notice he then did. There is no reason to question his statement in the notice that he was of that opinion, and it is supported by paragraph 39 of his affidavit. The additional considerations which had come to light by 2nd April 2001 can only have confirmed his opinion, but that does not mean that they were critical to it.

[29] In the present instance it is crystal clear that the reason advanced on grounds of national security was not the predominant reason for the Minister's decision. It stands as a separate and distinct ground for refusing registration at the national level. It is not entangled and mixed up with the other reason. It did not therefore materially affect the decision based on grounds of

A departmental policy. Accordingly, this is a case in which the Minister's decision to deny PSM registration at the national level may be upheld. And I would do so.

[30] There is a final point. I have repeatedly said throughout this B judgment that what was refused by the Minister and the ROS was registration at the national level. The ROS granted PSM registration in the State of Selangor. As advised by counsel on both sides, this does not prevent PSM from contesting in national elections. Neither is PSM prevented from seeking registration at C the national level if it is able to meet the ROS' requirement. So, even if the ROS and the Minister were wrong in refusing PSM national level registration (and I hasten to add that they were not), no injustice has been occasioned. This underpins the nature of judicial review. It is not enough that a decision of a public decision D maker is not in accordance with law. The error must be one that has caused an applicant for judicial review some harm or injustice in a broad and general sense. Hence, in *Banwari Nathoo v. State of Uttar Pradesh* AIR [1975] All 199 Gulati, J said:

> E That apart, it is also well settled that the writ jurisdiction of this court under Article 226 of the Constitution cannot be invoked merely by showing that an order is wrong. It must further be shown that it has resulted in miscarriage of justice (see *Pooran Singh v. Additional Commissioner, Agra,* (AIR [1957] All 276). If the impugned order in the instant case is set aside, it will amount F to the restoration of the allotment order in favour of the petitioner which, in my opinion, was clearly wrong.

[31] In *Ngu Toh Tung v. Superintendent of Lands and Survey, Kuching Division* [2006] 1 CLJ 30, this court was faced with a case where there had been a breach of statutory provision by the G respondent in that case. In refusing judicial review this court said:

> The appellants are quite correct in their submission that the first respondent's award is contrary to s. 60(1)(a) of the Code. But an infringement of the law *per se* is insufficient unless it visits or H is likely to visit a substantial injustice upon the appellants. If it does not, then the court is entitled to refuse *certiorari*. And this brings into sharp focus an aspect of public law remedies that is often overlooked. No doubt, the public law remedy of certiorari appears in the vast majority of cases to have been granted as of right once an infringement of the law was demonstrated. So, one I tends to assume that it is a remedy of right. But it is not. If you look carefully enough at those cases where the remedy was granted, you will find that they concerned applicants who had

suffered or were likely to suffer a substantial injustice in consequence of a breach of law. In my considered judgment the correct approach to public law remedies is that stated by Bose J in *Sangram Singh v. Election Tribunal* AIR [1955] SC 425 at p 429:

> That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Art 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily; and one of the limitations imposed by the courts on themselves is that **they will not exercise jurisdiction in this class of case unless substantial injustice has ensued,** or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case. (emphasis added.)

I need only add that the foregoing passage has been applied by our courts on a number of occasions. See, *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; *Khoo Ah Imm v. Datuk Bandar Kuala Lumpur* [1997] 3 CLJ 519; *Clara Tai Saw Lan v. Kurnia Insurans (M) Bhd* [2001] 2 CLJ 1; *Rama Chandran v. Industrial Court* [1997] 1 CLJ 147.

[32] For the reasons already given, this appeal fails. I would therefore dismiss it. The appellant must pay the respondent the costs of this appeal. The deposit in court shall be paid out to the respondent to account of his taxed costs. All the orders made by the High Court are affirmed.

[33] Before I conclude, I must express my gratitude to Dato' Mary Lim who argued this case for the Minister. Her clear and cogent arguments and citation of relevant authorities have made my task in writing this judgment an easy one.

[34] My learned brothers Mohd Ghazali bin Mohd Yusoff and Hashim bin Dato' Haji Yusoff JJCA have seen this judgment in draft and have expressed their agreement with it.